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SUPREME COURT, U. S.

No. 73-560

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

CHINESE MARITIME TRUST, LTD., ETC., PETITIONER

v.

PANAMA CANAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner is the owner of the S.S. *Sian Yung,* which sank and became an obstruction to navigation in the Panama Canal. Respondent Panama Canal Company removed the sunken vessel after petitioner advised the Canal Company that it had abandoned the vessel to its insurance underwriter and that the underwriter did not intend to remove the vessel. Faced with cargo claims of some $1.6 million and a claim by the Canal Company, estimated at $2 million, for wreck removal expenses, petitioner instituted a proceeding in the Southern District of New York to limit its liability to its interest in the vessel and her then pending freight, pursuant to the Shipowners' Limited Liability Act, 46 U.S.C. 183-185, 188 ("Limitation Act") and Rule F of the Admiralty Rules.

The district court approved an *ad interim* stipulation for value of $16,246.57 and issued an order restraining the commencement or prosecution of any suits to recover damages arising out of the casualty and requiring all parties with claims against petitioner to file them in the limitation proceeding. But, on motion of the Canal Company, the district court further ruled that the action for the wreck removal expenses would not be subject to the restraining order. The district court reasoned that since petitioner was fully aware that it had failed to remove its sunken vessel it could not, as a matter of law, limit its liability for the removal expenses under the Limitation Act, because that Act (46 U.S.C. 183(a)) is available to a shipowner only when the incident involved occurred "without the privity of knowledge of such owner" (Pet. App. 3a; 361 F. Supp. 1175). The Second Circuit affirmed the district court's order giving essentially the same reasons, but conditioned its affirmance upon the consent of all parties to litigate their claims in the Southern District of New York (Pet. App. 11a; 478 F. 2d 1357-1358).

Since the decision of the Second Circuit is clearly correct, and since there is no conflict of decisions, further review by this Court is not warranted.

Petitioner acknowledges (Pet. 9) "that once the owner knows that the vessel has been sunk, its failure to remove it is necessarily within its privity and knowledge * * *." But if this is so, it necessarily precludes petitioner from resort to the Limitation Act, which is available to a shipowner only if he is "without the privity or knowledge" with respect to the incident involved (46 U.S.C. 183(a)).

Petitioner's contentions here concern matters not at issue below, which the courts expressly did not reach. Petitioner seems to argue that the effect of the decisions below is to deny to non-negligent owners of vessels sunken in the Panama Canal their alleged right to avoid *in personam* liability by abandoning those vessels. But the fallacy of this argument is that it has nothing to do with the case in its present posture. The decisions below do not in any way preclude petitioner from claiming in any independent action the Canal Company may bring that petitioner was not negligent, and that a non-negligent shipowner may abandon his sunken vessel in the Panama Canal and avoid *in personam* liability. Both courts below carefully noted that these issues were not before them, and that they were expressing no views as to their merits (Pet. App. 16a; 478 F. 2d at 1361; Pet. App. 5a; 361 F. Supp. at 1178-1179). The courts below merely held that petitioner is not entitled to the automatic protection against *in personam* liability provided by the Limitation Act, for the simple reason that petitioner was not "without the privity or knowledge" with respect to the necessity for the removal of its vessel by the Canal Company, and thus failed to meet a condition precedent to the invocation of that Act. Since petitioner nowhere challenges this holding, there is no occasion for further review by this Court.[1]

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[1] Petitioner argued below that as a matter of equity all claims arising out of the sinking of its vessel should be prosecuted solely in the pending limitation proceeding rather than become the subject of litigation in other districts with consequent inconvenience and possible duplication of effort. At oral argument before the court of appeals counsel for the Panama Canal Company stated that he would recommend that the Canal Company commence its

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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independent action against petitioner in the Southern District of New York, and the Second Circuit conditioned its affirmance upon consent to this procedure. This adequately meets petitioner's "convenience and efficiency" complaint (Pet. 14).

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